U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	COMMANDANT
	:	ON APPEAL
MERCHANT MARINER'S DOCUMENT No. 462-68-3533	:	NO. 2555
Issued to: Lucien H. LAVALLAIS, Appellant	:	

This appeal has been taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

BACKGROUND

By order dated September 8, 1992, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, revoked Appellant's merchant mariner's document upon finding a use of dangerous drugs charge proved. The supporting specification, which was also found proved, alleged that Appellant was a user of cannabinoids, based upon laboratory tests of his urine conducted at Compuchem Laboratories, Inc. (Compuchem).

Appellant represented himself at a hearing held at Mobile, Alabama on August 23, 1992. His wife, Helen Lavallais, appeared with him. At the hearing, Appellant entered ananswer of "guilty with an explanation" to the charge and specification. The Administrative Law Judge, after listening to the Appellant's explanation, which in essence was a denial of knowingly ingesting marijuana, directed the Investigating Officer to produce evidence. The Investigating Officer introduced into evidence four exhibits, and the testimony of three witnesses. In defense, Appellant offered two exhibits.

The Administrative Law Judge advised Appellant that if the charge was found proved, an order of revocation would be required unless Appellant provided satisfactory evidence of cure. After the hearing, the Administrative Law Judge rendered a written decision and order, and concluded that the charge and specification had been found proved. The order, dated September 8, 1992, revoked the above captioned documents issued to Appellant by the Coast Guard.

Appellant submitted timely notice of appeal in accordance with 46 C.F.R. § 5.703(a) and then timely completed his appeal on November 8, 1992. Therefore, this appeal is properly before the Commandant for review.

FINDINGS OF FACT

At all relevant times, Appellant Lucien H. Lavallais was the holder of Merchant Mariner's Document No. 462-68-3533. On June

6, 1992, Appellant, for pre-employment drug testing purposes, provided a urine specimen at the Texaco Health Department in Port Arthur, Texas. Ms. Oneida Vinecour, a staff nurse and urine specimen collector at the Texaco Health Department, collected Appellant's urine specimen. During the process, Appellant did not sign section VII of the Drug Testing Custody and Control Form (DTCCF) certifying that he provided the urine specimen contained in the bottle identified with number 0506781590.

The specimen was packaged and sent to Compuchem, a National Institute on Drug Abuse certified testing laboratory, in Durham, North Carolina. Compuchem provided a report indicating that specimen I.D. No. 0506781590 had tested positive for cannabinoids. Compuchem then forwarded its laboratory report and one copy of the DTCCF, the laboratory part, to Dr. Matthew Martin Hine, Medical Review Officer (MRO) for Texaco, who reviewed the results. The MRO subsequently interviewed the Appellant via telephone and concluded that Appellant's urine specimen tested positive for cannabinoids in accordance with applicable regulations. The laboratory report and testimony of the MRO were entered into evidence.

Appearance: Pro se.

BASIS OF APPEAL

On appeal, Appellant contends that the chain of custody for the specimen which is the subject of the laboratory report used

to establish a presumption of dangerous drug use was defective because he had not signed a DTCCF.

OPINION

A.

When the Coast Guard brings a use of dangerous drugs charge based upon a urinalysis, the specimen itself is not produced as evidence in the proceeding. However, a presumption of dangerous drug use is established by the laboratory report of the chemical test results indicating the presence of dangerous drugs. 46 C.F.R. § 16.201(b).

The unrebutted presumption is sufficient to find a charge and specification alleging use of a dangerous drug proved. Appeal Decision 2279 (LEWIS). Once the charge is found proved, all licenses and documents shall be revoked, unless the respondent establishes satisfactory proof of "cure." 46 U.S.C. § 7704(c).

In order to maintain the integrity of the drug testing program, it is critical that the regulatory chain of custody and specimen integrity safeguards be followed. A drug use charge may be found proved even when minor procedural errors not adversely affecting the actual chain of custody or specimen integrity exist. See, Gallagher v. National Transportation Safety Board, 953 F.2d 1214 (10th Cir. 1992). However, the record in this case reveals that significant procedural errors occurred which render the evidence unreliable.

B.

Coast Guard regulations require marine employers to establish and utilize drug testing programs which comply with the Department of Transportation (DOT) requirements contained in 49 C.F.R. Part 40. 46 C.F.R. § 16.301. The DOT requirements are patterned after the Department of Health and Human Services (DHHS) "Mandatory Guidelines for Federal Workplace Drug Testing Programs" contained at 53 Fed. Reg. 11970, et seq. See, 53 Fed. Reg. 47067. The purpose of the DHHS guidelines, as adopted by the DOT regulations, is to provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the drug tests using appropriate scientific methods and "rigid chain of custody" procedures. 53 Fed. Reg. 47067. Furthermore, the Coast Guard regulations explicitly require that a chain of custody be established and maintained from the time of specimen collection through the testing of the specimen. 46 C.F.R. § 16.320(a).

A properly established chain of custody ensures that the chances of a specimen being altered, contaminated, switched, or lost are minimized and that test results provided are, in fact, those of the indicated specimen. 53 Fed. Reg. 47075. In order to insure the chain of custody is properly established, the donor and the person collecting the sample are both to be present at the same time when (1) the collection site personnel place an identification label and tamperproof seal on the sample bottle, (2) the donor initials the identification label for the purpose of certifying that it was the specimen collected from the donor,

(3) the collection site person enters on the DTCCF information identifying the specimen and signs the DTCCF certifying that the collection was accomplished according to the applicable requirements, and (4) the donor is asked to read and sign a statement on the DTCCF certifying that the specimen identified has been collected from him or her and is, in fact, the specimen he or she provided. 49 C.F.R. § 40.25(f)(18)-49 C.F.R.
§ 40.25(f)(22)(i). Thus, the donor's certification is a critical part of the evidence needed to establish the presumption of dangerous drug use through chemical testing. 46 C.F.R.
§ 16.201(b).

The Secretary of Transportation has also published guidelines for implementing the drug testing regulations. Operating Guidance for DOT Mandated Drug Testing Programs (June 1, 1992)(Guidance). By its own terms, the Guidance is not binding in these proceedings, nor does it constitute regulation. However, the Guidance attempts to "draw the line" on allowable procedural errors. The Guidance lists as grounds for rejection of a urine specimen, among others, the lack of donor certification on the DTCCF. Specifically, the Guidance states that, unless "donor refusal to sign" is stated in the remarks section of the DTCCF, MRO's should cancel a positive specimen when the donor's signature is omitted from the certification statement.

Therefore, a DTCCF with an unsigned and unexplained missing signature under the donor certification section cannot be considered reliable and probative evidence of a proper chain of custody.

The investigating officer here introduced into evidence, without objection, the MRO records which included the DTCCF.
I.O. Exhibit 3. The Appellant's signature is conspicuously absent from the donor certification portion of the DTCCF. The record does not indicate whether the MRO considered the missing signature when evaluating the chemical test results. The law judge also did not address the defect. Therefore, as a result of the missing signature, this chain of custody document is deficient on its face.

C.

Notwithstanding, a positive test result of an individual's urinalysis sample may still be considered substantial evidence as long as the record indicates that the "actual" chain of custody has been maintained. Gallagher v. National Transportation Safety Board, supra. In Gallagher, the technician at a medical clinic applied the tamperproof seal improperly. The court determined that in spite of the procedural error, there was no evidence of an "actual" break in the chain of custody. Thus, where evidence establishes that the "actual" chain of custody has been maintained, the test results of such samples may still create the presumption of drug use, notwithstanding the lack of donor signature on the DTCCF. The occasion to pass on such situations will be rare since the MRO is supposed to reject specimens that, without explanation, have the donor's signature missing from the DTCCF certification statement. Department of Transportation Medical Review Officer Guide, Appendix E (October 1990). This is not one of those rare occasions.

The other evidence in the record consists of the custody control documents from the testing laboratory and the telephonic testimony of the specimen collector, Ms. Vinecour.

Compuchem certified, on copy 2 of the DTCCF, that the specimen was examined upon receipt, handled and analyzed in accordance with applicable Federal requirements. Investigating Officer Exhibit 3. However, on the copy of the DTCCF received by the laboratory, the donor certification portion is blacked out so that the donor remains anonymous. Therefore, the laboratory was, in fact, unable to determine the extent of compliance with all applicable Federal requirements. Obviously, due to the blacked out portion, the laboratory would be unable to determine if the donor signed the DTCCF in accordance with 49 C.F.R. § 40.25(f)(22)(i).

Ms. Vinecour stated, during telephonic testimony, that to the best of her knowledge, she complied with all of the steps required under the Department of Transportation guidelines. (Tr. at 28.) However, the record reveals that she, as the specimen collector, failed to properly identify the Appellant prior to taking the specimen. The regulations contained at 49 C.F.R. § 40.25(f)(2) require collection site personnel to positively identify the employee selected for testing. She further testified that she could not identify him if she were testifying in person at the hearing. Ms. Vinecour also stated that she maintained a logbook at the clinic, in which donors were signed in. I.O. Exhibit 2. The Appellant's name is printed in the log. The date entered opposite his name is out of order with the dates of persons logged in immediately above and below him.

Furthermore, at some point during Ms. Vinecour's testimony, it became apparent that she was having off the record discussions with another person in the room. That person was subsequently identified as the head nurse. The record does not indicate the nature and extent of the discussion between the two. However, it is clear that the head nurse should have been subsequently treated like a witness, sworn, duly examined, and cross-examined.

Witness testimony must be taken under oath and subject to cross-examination. 46 C.F.R. § 5.535(a). I am unable to determine the prejudice to the Appellant because neither the witness nor the head nurse was questioned about the substance of the conversation between the two. Accordingly, I cannot rely on Ms. Vinecour's uncorroborated testimony that she complied with all the required steps.

For the aforesaid reasons, I cannot find that the "actual" chain of custody was established by other evidence in the record and, thus, the order of the Administrative Law Judge cannot be sustained.

CONCLUSION

Significant procedural errors have occurred and the record is devoid of other substantial evidence of reliable and probative value which could sustain the Administrative Law Judge's order. The findings of the Administrative Law Judge are not supported by substantial evidence of a reliable and probative nature. The prospect of obtaining proper evidence is too remote to authorize a rehearing.

ORDER

On the basis of the foregoing authorities and reasons, the findings of the Administrative Law Judge dated September 8, 1992, are SET ASIDE, the order VACATED, and the charges are DISMISSED with prejudice.

J. W. Kime
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C. this 14th day of February, 1994.